Petition

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

FRANK T. SOLMITZ, by and through
his Guardian ad Litem PATRICIA SOLMITZ,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

Whether a research and development contract between the United States and a prime contractor is correctly construed to grant ownership to the prime contractor, other than designated buildings, of all improvements on the prime contractor's land, despite the fact that the construction, repair and maintenance of those improvements was and continues to be financed solely by the United States?

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OPINION BELOW

The opinion of the Court of Appeals (Appendix A, p. A-1) is reported at 640 F.2d 1089. The findings of fact and conclusions of law (Appendix B, p. A-7), order denying reconsideration (Appendix C, p. A-12), and judgment of dismissal (Appendix D, p. A-13) of the District Court are not reported.

JURISDICTION

The judgment of the Ninth Circuit was entered March 30, 1981. A timely petition for rehearing was denied May 8, 1981. (Appendix E, p. A-14.) This petition is filed within 90 days of that date. Jurisdiction of this Court is based on 28 U.S.C., § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

There is no statutory or constitutional provision directly involved in the decisions of the courts below. The policy espoused by 10 U.S.C., § 2353, with respect to military research and development contracts, however, is at stake under the construction adopted below of the property clause of the prime contract between the United States and the Regents of the University of California, first executed in 1948, and since continuously renewed. The provisions of 10 U.S.C., § 2353 are set forth in Appendix F, p. A-15. The relevant provisions of the property clause of the prime contract are set forth in Appendix G, p. A-16.

The critical documents, on which the construction of the contract by both courts below turned, are Article I of an Occupancy Agreement, executed pursuant to the property clause of the contract in 1948, and Exhibit A and an accompanying map to that agreement. The relevant portions of the Occupancy Agreement are set forth in Appendix H, p. A-19. The entire text of the original, 1948 version of Exhibit A is set forth in Appendix I, p. A-22.[1]

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[1]The original map was never produced. Following oral argument the Government informed the Ninth Circuit that the University would supply the original, if it could be located. Instead, the University supplied a map drawn September 9, 1980, after full briefing on appeal. This map contained no markings to indicate Government and University ownership of the improvements placed on the University's land, as had been the earlier practice. (See Appendix J, p. A-23, which was appended as an exhibit to the petition for rehearing before the Ninth Circuit, which shows the particular improvement involved here—the "west access road"—as Government owned property.

STATEMENT OF THE CASE

Petitioner, a senior research physicist at Lawrence Berkeley Laboratory for 10 years, was severely injured when struck by a bicyclist while crossing Cyclotron Road on University land in a marked crosswalk. He sued the United States under the Tort Claims Act (28 U.S.C., § 2671 et seq.) on the grounds that it "owned, constructed, controlled and maintained" the road, and that it was unsafe. Jurisdiction of the District Court was, therefore, based on 28 U.S.C., § 1346(b).

The Government denied ownership, and a bifurcated trial was held on that issue. Based exclusively on documentary evidence, the District Court found that the road was not government-owned. (App. B, p. A-11.) Thereafter, it denied petitioner's motion for reconsideration, based on new evidence (App. C, p. A-12), and entered judgment of dismissal (App. D, p. A-13). The soundness of this conclusion depends on the construction of the property clause of the prime contract, occupancy agreement, executed pursuant to that clause, and Exhibit A of the Occupancy Agreement which listed all government-owned property under the Occupancy Agreement (App. H, p. A-20), and which included Cyclotron Road. (App. I, p. A-22.)

Following a few ad hoc contracts with the Manhattan Engineering District of the United States Army during World War II, the District negotiated a major, 5-year contract—W-7405-eng-48—with the University on April 20, 1943. The Atomic Energy Commission thereafter took over all of the District's operations and property (see 60 Stat. 765), including the University's Radiation Laboratory, which was "not a Government-owned facility except for

certain buildings and equipment." (*First Semiannual Report of the AEC,* Sen. Doc. 8, 80th C., 1st S., p. 4.) At the end of the first 5-year period, a new agreement, Modification 17, was negotiated with the University, effective July 1, 1948, which continued the same contract number.

The substantive contents of all AEC contracts at this time were secret. (See Newman, *The Atomic Energy Industry: An Experiment in Hybridization,* 60 Yale L. J. 1263, 1332, 1339 (1951).) And the version of the contract furnished at trial was Modification 22, in effect at the time of the accident, not when the road had been constructed. Nevertheless, Article IX of Modification 22 was treated as the same as that in Modification 17. (See App. B, p. A-8.) Paragraph 2 of that article, provided, as relevant:

> ". . . [T]itle to all materials, equipment, supplies, and tangible personal property of every kind and description and any other property purchased by the University, the cost of which is allowable under this contract shall pass directly from the vendor to the Government. . . . Property . . . purchased or furnished by the University, title to which vests in the Government under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property, nor any part thereof be or become a fixture or lose its identity as personalty by reason of affixation to any realty." (See, G, pp. A-16, A-17.)

Paragraph 10(a) of Article IX, provided for the "lease or occupancy of real property of the University upon

which structures and other improvements financed by the Government are or will be constructed or altered. . . . The basic terms and conditions applicable to [these] arrangements . . . are set forth in Appendix C." (App. G, p. A-17.) Appendix C set forth the requirements, but not the terms, for such agreements. The use of occupancy agreements rather than leases was dictated solely by the University's concern that it might be subjected to right of re-entry claims should certain parcels—deeded to the University exclusively for educational purposes—be leased for purposes which were not strictly educational.

The occupancy agreement of June 28, 1948, covered "buildings and improvements" (collectively, "Structures") erected on the campus with Government funding. (App. H, p. A-19, recital 3.) Article I of this agreement provided, as relevant:

> "University hereby gives to Government, only for accommodation, housing and use of Commission . . . the right to occupy and use jointly with University the [real] property on which the Structures *delineated* as 'Government owned' *on* that certain map and statement . . . marked 'Exhibit A,' and by this reference made a part of this agreement, are located *together with* the right of ingress to and egress from the Structures, over and across the presently existing road . . . and over that certain road [involved herein] the construction of which is being undertaken pursuant to the provisions of that certain subcontract dated the 20th day of April 1948, . . . and over any other road or other reasonable means of access subsequently to be constructed or provided by either University or Government." (App. H, pp. A-20, A-21, [Emphasis added].)

This agreement does not, by its terms, designate which "structures" are deemed Government-owned for purposes of the contract. It was the function of Exhibit A of the Agreement, and the accompanying map, to designate those. The original, March, 1948, version of Exhibit A is reproduced in full as Appendix I at p. A-22.

There are several important facts about this exhibit. First, its overall title is "Statement and Map Delineating *Government Owned* Structures and *Improvements* on Regular University Campus." (Emphasis added.) Second, both columns under this general heading are also titled "*Government Owned* Structures and *Improvements.*" (Emphasis added.) Third, most structures and improvements, such as buildings, are readily identifiable by numbers on the accompanying map. These are identified by their respective numbers in the two columns of Exhibit A. Some "structures", however, are not subject to such numerical identification; such as roads, walks, utility lines, and other meandering "improvements." These are grouped under a final heading, in the second column of "Government Owned Structures and Improvements" under the catchall category of "Utilities Financed by Government." Fourth, in this list is found a specific reference to the road ownership of which is at issue in this case.

While this express reference to the road was dropped in the 1954 version of Exhibit A, it was restored in 1955 and retained thereafter in all subsequent revisions as more Government-owned structures and improvements were added or others removed. (See App. A, p. A-3.)

Government ownership of the road is also shown by the only two subcontracts concerning the road which were pro-

duced at trial. The 1948 subcontract for its construction reads as if between the University and the subcontractor, although it is labeled "Subcontract No. 14 under Contract W-7405-eng-48." It was, in fact, a University form, and, consequently, defined the Regents as "Owner." The article substituted for this provision, however, provided that the "term 'Owner' as used herein for the convenience in utilizing the University of California's forms of Agreement, shall mean the Regents . . . , Prime Contractor under Government Contract No. W-7405-eng-48." Also, a new article on wages was inserted, which required compliance with the Davis-Bacon Act. (40 U.S.C., §§ 276a, 276a-1.)[2]

By 1951, when the road was repaired, special forms for subcontracts under the prime contract had been prepared. Article X, paragraph 1, of that subcontract expressly provided, pursuant to Article IX of the prime contract, that "[t]itle to all work completed shall vest in the Government."[3] And, while the 1948 subcontract did not require performance and payment bonds, they were nevertheless provided, and the 1951 subcontract not only required those

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[2]On AEC policy which required compliance with the Davis-Bacon Act in all subcontracts, see Caruso, *Contracting with the Atomic Energy Commission*, 4 Atomic Energy L. J. 339, 355-56 (1962).

[3]The full text of Article X, ¶1, of the 1951 subcontract read: "Title to all work completed shall vest in the Government. This provision shall not be construed as relieving the Subcontractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the University to require the fulfillment of all the terms of this Subcontract."

bonds,[4] but they, as well as the required insurance policies, were required to deny sureties and insurers the right of subrogation against the Government. In addition, the 1951 subcontracts continued the provisions requiring compliance with the Davis-Bacon Act.

REASONS FOR GRANTING THE WRIT

1. The Erroneous Construction of the Contract Below Is Contrary to Well and Long Established Federal Policy With Respect to Payment for or Retention of Property Acquired for Use by a Prime Contractor at Public Expense

A. The decision below is clearly wrong

The District Court held that Article I of the Occupancy Agreement, which referred specifically to Cyclotron Road, must govern over the general provisions of Paragraph 2 of Article IX of the prime contract, which did not mention the road specifically, and that the Occupancy Agreement only granted the Government the right of ingress and egress over the road, not title to it. (App. B, pp. A-10, A-11.) The Ninth Circuit affirmed: "The University and the government together were parties to only two documents in evidence that specifically refer to the Cyclotron Road:

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[4] *Compare* current Cal. Civ. Code § 3099, which includes the University within the definition of "public entity" for purposes of the mechanic's lien laws, *with* former Cal. Code of Civ. Proc. § 1190.1 (g), 1967 Cal. Stat., Ch. 789, which did not. On AEC policy requiring payment and performance bonds of all its fixed-fee subcontractors, which these subcontractors were, see Hiestand & Florsheim, *The AEC Management Contract Concept*, 29 Fed. B. J. 67, 87 (1969); on the policy reasons why the Commission did *not* require Miller Act bonds, see Minsch, *Subcontracting in the Atomic Energy Program*, 16 Fed. B. J. 190, 200-01 (1956).

the Occupancy Agreement and 'Exhibit A.' These documents fail to establish any government interest in the road other than a right-of-way. Specific contractual references take precedence over general terms. Solmitz presented no evidence other than the contracts in support of his theory that Cyclotron Road is the 'personal property' of the United States government." (App. A, pp. A-5, A-6.)

These conclusions are a perverse reading of the two supplementary documents authorized by paragraph 10 of Article IX of the prime contract.

First, the Occupancy Agreement does not purport to specify *any* structure or improvement as Government-owned. By its express terms, that function is performed by Exhibit A, and the accompanying, but missing map. (See, in this regard, App. J, p. A-23.)

Second, the Occupancy Agreement does grant the Government the right of ingress and egress over the University's land on Cyclotron Road, but also on any other road existing or to be built on University land. That right, however, is not inconsistent with Government ownership of the road itself, anymore than would be a provision that granted the Government the right to use a bridge constructed over a gulley on University land with federal funds. And, as the 1955 version of the lease agreement quoted by the Ninth Circuit (App. A, p. A-3) demonstrates, the parties secured the University's right to use the road over its own land, a peculiar provision, if the University owned the road, as well as the land.[8]

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[8]When the Occupancy Agreement was drafted, Cyclotron Road was only planned, and the only existing access road was University-owned. It was, thus, appropriate for the University to grant a right

Third, Exhibit A *lists* the road as Government property. Improvements "financed by the Government" are, by the terms of paragraph 2 of Article IX of the prime contract, Government-owned property. And, if the road were *not* Government-owned property, why was it consistently listed on Exhibit A, the sole purpose of which was to designate the structures and improvements title to which the Government was reserving under Article IX of the prime contract? Neither the Government, nor the District Court, nor the Ninth Circuit has ever made the slightest attempt to explain this otherwise paradoxical behavior of the contracting parties.

Fourth, the Ninth Circuit opinion is wrong, when it states that petitioner presented no other evidence. In fact, he presented the depositions of the two principle enforcement officers—for the University and the Government—during the first decades of the operation of the contract, both of whom unequivocally testified that the road was intended to be and is Government-owned property. The Government presented one deposition of a University officer who was not a percipient witness to the original understanding, whose testimony was based exclusively on the grant of the right of ingress and egress under th Occupancy Agreement, and a declaration of a current officer of the Energy

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of ingress and egress over that road, and as well as over its land wherever future roads were placed. After the new road was constructed by Government, however, the Government granted the University a right of ingress and egress over its road. This was done by amendment of the leases, which did *not* incorporate by reference Exhibit A of the Occupancy Agreement, but was not necessary in the Occupancy Agreement, because it *already granted* the University *that right*. (See App. H, p. A-21.) And the road was *already expressly identified* Government-owned in Exhibit A of that agreement.

Research and Development Administration, also a non-percipient witness, who merely asserted his understanding that Government's interest was limited to a right of ingress and egress over the road. Both of petitioner's witness had long been retired, and had nothing to gain from the litigation. Both of Government's witnesses represented parties who had much to gain or lose from the litigation.

In any event, wholly apart from any parol evidence, the *only* construction which reconciles the listing of the road on Exhibit A with the text of the other documents is that the Occupancy Agreement implemented, and did not repudiate the provisions of Article IX of the prime contract, and, therefore, title to the road was, as would be immediately apparent if it were a bridge, retained by the Government. (See, e.g., *Martin Lane Co. v. U.S.* (Ct. Cl. 1970) 432 F.2d 1013, 1019; *J. B. Williams Co. v. U.S.* (Ct. Cl. 1971) 450 F.2d 1379, 1388.)

B. The decision below conflicts with established federal procurement policies and should be corrected

In the District Court, the Government sought to disavow title to the road because the road had never been formally acquired under 40 U.S.C., § 255 or 42 U.S.C., § 2224. (See § 13 of the 1946 Act, 66 Stat. 772, which authorized AEC acquisition of property by eminent domain.) This argument, however, assumed its conclusion. Realty was never acquired under AEC procurement contracts (see § 5.4 of the 1951 procurement regulations, 16 F.R. 1759 et seq.),[6] but

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[6] "This part [on procurement policy] does not apply to the purchase, rental, or other acquisition of real property or rights or interests in real property. . . ."

the Commission did retain title to personal property attached to its prime contractors' land, as evidenced by Article IX, ¶2, herein.

This policy is not unique in federal procurement contracts generally. For example, 10 U.S.C., § 2303(b) expressly provides that the military procurement law (1) "does not cover land" but (2) does "cover all other property including—[¶] (1) public works . . . ." Indeed, traditionally, property paid for by the Government becomes and remains Government property unless disposed of. (See Richardson, *Methods of Supporting Basic Research,* 17 Fed. B. J. 281, 284 (1957).) And, while the property clause used by the AEC was sometimes tailored to the particular situation (see Ramey & Erlewine, *Introduction to the Concept of the "Administrative Contract" in Government Sponsored Research and Development,* 17 Fed. B. J. 351, 364-65 (1957)), the provisions of Article IX, ¶2, were clearly standard AEC policy.[7] Thus, when the property clause was made public, many years later in 1961, it was still basically the same as Article IX herein, except for those provisions dealing with the occupancy and/or lease of University real property. (See 26 F. R. 11489.) And those special provisions are totally consistent with standard federal policy with respect to placement of Government-financed facilities on the land of a prime contractor.

The Occupancy Agreement was designed to ensure, as recognized by Article IX, ¶10(b) (see App. G, p. A-17), that

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[7]The only major early study of AEC procurement policy does not even note the problem, it was apparently so well established. (See Tybout, *Government Contracting in Atomic Energy* (1958).)

the Government was either paid for or could remove all such property. This is *standard* federal policy. For example, the provisions of 10 U.S.C., § 2353, covering military research and development contracts, provides:

> "(b) Facilities that would not be readily removable or separable without unreasonable expense or unreasonable loss of value may not be installed or constructed under this section on property not owned by the United States, unless the contract contains—
>
> "(1) a provision for reimbursing the United States for the fair value of the facilities at the completion or termination of the contract or within a reasonable time thereafter;
>
> "(2) an option in the United States to acquire the underlying land; or
>
> "(3) an alternative provision that the Secretary concerned considers to be adequate to protect the interests of the United States in the facilities."

The second alternative was impossible here, due to the University's concerns with deed restrictions under which its land was acquired, but a comparison of Articles III[8]

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[8]"Upon the termination date the University shall have the right to purchase any or all of said Structures at a price or prices to be agreed upon provided that University shall give Government not later than three years after the termination date, notice in writing of University's election to exercise said right. . . . Should Government and University be unable to agree upon the purchase price to be paid by University for any Structure which University may elect to purchase, the purchase price to be paid by University for the Structure shall be determined by an appraiser . . . [or board of appraisers] . . . . It shall be the duty of the appraiser or board of appraisers, as the case may be, in determining the purchase price of any Structure, to give full consideration to the matter of the

and IV[9] of the Occupany Agreement with the statute's provisions establishes that both the remaining alternatives of § 2353 were secured by the Government in its contract with the University.

Accordingly, it is vital for this Court to correct the erroneous construction of the instant contract to prevent other prime contractors from relying on its reasoning to effect free acquisition of Government property at the public's expense.

2. The Fiscal Impact of the Decision Below Extends Far Beyond the Cost and Continuing Maintenance of the Improvement Involved Here, The Full Extent of Which Is Impossible to Estimate

A. The decision below not only grants the University, without compensation, title to the road which, under the contract, the Government continues to maintain, but all other improvements which are similarly identified on Exhibit A of the Occupancy Agreement

The courts below held the road was not Government-owned because it was listed under a subheading (rather than by a number on the accompanying, but missing map) of "Utilities Financed by Government." (App. A. p. A-3; App. B, pp. A-10, A-11.) That category in the 1948 version

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original cost of the Structure, to the matter of appropriate depreciation from the date of the erection of the Structure to the time of the appraisal thereof, and to the applicability of discounts authorized by law."

[9] "Government, subject to University's right to purchase any or all of the Structures, . . . may at any time during said period of three years remove any or all of said Structures which University has not elected to purchase. . . ."

also included "Miscellaneous roads and walks financed by Government." (App. p. A-22.) Later versions of Exhibit A added under a subheading "Utilities and Improvements Financed by Government" these improvements: "Electrical and mechanical utility systems serving Government owned and occupied buildings."[10] All of these roads, walks, wiring, and much more, will necessarily also be donated to the University, since they are not differentiated from the road.

The extent of this gift is suggested by the testimony of one of petitioner's witnesses who explained the reason for all these Government-owned improvements being covered by the Occupancy Agreement rather than by leases. "[T]here were to be utilities, roads, and various other things required . . . . But how did you do that other than by pipelines that were running here, there, and every place? And that is where the occupancy agreement came in . . . ." For, "[h]ow are you going to define [in] the lease of a piece of property that you have [to] run a water line out over, or some place?" The basic practice, then, became to place the main structures under a lease and "[t]hen all of the things running from where that property line [for the lease] stopped was lumped under utilities financed by the Government or the miscellaneous roads

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[10]Thus, the January 1, 1963, revision, concluded:

"*Utilities and Improvements Financed by Government*

"1. Access Road (known as Cyclotron Road) on regular University Campus.

"2. Roads and walks between Government-owned and occupied buildings.

"3. Electrical and mechanical utility systems serving Government-owned and occupied buildings."

and walks [so] financed—it was mainly to simplify how these agreements, specific lease agreements were drawn up." This practice was intended to cover even Government-financed utilities which were *connected* to existing University improvements. "See, the University had some improvements up there, sewers, water, some utilities, but all the utilities that the Government put in, even though they could be connected to the other, was Government property, acording to the way we always interpreted it."

While it is impossible for petitioner to estimate the extent of the gift of public property effected immediately by the decision below, it is clearly not an insubstantial sum. For, as his witnesses testified, Exhibit A was drawn up "to satisfy the government." It was supposed to be "as complete as they could make it." And, while at first the University "ignored" the utilities, "[t]he government objected" because they had all been paid for by the Government.

Not only will all these improvements become University property without reimbursement for the cost of their construction and maintenance to date, but the public will also be required, so long as the the prime contract continues to be renewed, to maintain those improvements, despite the fact they will no longer be Government-owned. Thus, beyond the immediate, unknown loss to the public fisc, that loss will continue to increase into the indefinite future.

B. The decision below will support similar claims to improvements on real property by other prime contractors, the extent of which is potentially great, but unknown

As noted at the outset, all early contracting by the AEC was secret. (See Newman, *supra,* 60 Yale L. J. at 1332, 1339.) It is clear, however, that the legal issue tendered by this case is not confined to the Government's contract with the University.

The AEC conducted most of its research through prime contracts with industry and universities. (*Seventh Semiannual Report of AEC* 51-52 (1950); *Ninth Semiannual Report of AEC* 39 (1951); Newman, *supra,* 60 Yale L. J. at 1284-85.) Construction of improvements on the land of its contractors was authorized under its earliest available regulations.[11] And completed facilities were treated as capital investments. (See *Sixteenth Semiannual Report of AEC* 13 (1954); *Nineteenth Semiannual Report of AEC* 197 (1956).

Given the unique nature of the projects for which the Commission was responsible, its contracts necessarily were largely performed on the premises, adapted as necessary, of those prime contractors which could provide the neces-

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[11] "The term 'construction' refers to the erection or installation of any building, structure, plant, ground facility on real property and material alterations or improvements thereto, regardless of purpose." (¶ 1-13.4 of the Unclassified Portion of the *Atomic Energy Commission Contract Manual,* Appendix to *Hearings on Selection of Site for Reactor Test Station before Joint Committee on Atomic Energy,* 81st C., 1st S., 147, 150.)

sary expertise.[12] Sections 3(a) and 4(c)(2) of the 1946 Act authorized research and development contracts without regard to normal bidding requirements. (60 Stat. 758, 759.) And the Commission placed responsibility on its prime contractors for implementation of all aspects of its work. It sought "as much direct service for design and procurement as possible." (¶ 4-35 of the Unclassified Portion of the *Atomic Energy Commission Contract Manual*, Appendix to *Hearings on Selection of Site for Reactor Test Station before the Joint Committee on Atomic Energy*, 81st C., 1st S., 147, 165 (1949); see also *A Guide for Contracting of Construction and Related Engineering Services* [*with the AEC*] 10-12 (1949).) "In short, under the 'administrative' or 'management' contract, the AEC . . . [was] responsible for *'what'* is to be done and the contractor for *'how.'* " (Ramey, *Economy in Government Contracting—Atomic Energy Commission Experience*, 29 Law & Contem. Prob. 380-81 (1964).)

The terms of the Commission's standard property clause highlights the likelihood of widespread and extensive improvements on the land of many if not all its prime contractors. Title to all of these improvements will be vulnerable to the claims of those contractors should the decision below stand. While the use of an occupancy agreement may not be widespread, the same issue can arise under the terms of leases. Roads, water lines, electrical systems, sewers, paths, landscaping, all such improvements

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[12] "One of the early AEC actions was the elimination of AEC 'contract representatives' physically located in the major production and research facilities." (Hiestand & Horsheim, *supra*, 29 Fed. B. J. at 70.)

and more, are required for buildings placed or expanded on a contractor's land, by lease or otherwise.

Accordingly, while the Government may perceive an immediate savings in public funds by denying ownership of the instant road, assuming liability were established on reversal, the ultimate cost to the public could be astronomical. This Court should, therefore, first determine if the decision below implements sound federal and public policy.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

SIEGFRIED HESSE
EDWARD M. DIGARDI
WILLIAM D. DOUGLAS

By SIEGFRIED HESSE
Counsel for Petitioner

(Appendices follow.)

Appendix A

United States Court of Appeals,
Ninth Circuit.

No. 78-3419.

Frank T. SOLMITZ, by and through his Guardian ad Litem Patricia Solmitz, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

Argued and Submitted Oct. 9, 1980.

Decided March 30, 1981.

Appeal from the United States District Court for the Northern District of California.

Before GOODWIN and NORRIS, Circuit Judges, and McNICHOLS,* District Judge.

GOODWIN, Circuit Judge.

Frank T. Solmitz appeals from a judgment dismissing his federal tort claims action. He contends that the district

*The Honorable Robert J. McNichols, United States District Judge for the Eastern District of Washington, sitting by designation.

court erred in rejecting, as a matter of law, his theory that the road on which he suffered his injury was owned by the United States.

Solmitz was struck by a bicyclist while crossing Cyclotron Road, near the Lawrence Nuclear Research Laboratory at the University of California, Berkeley. Solmitz sued the United States on the theory that under California law, the government, as owner of the premises, was liable for his injuries because it negligently maintained the road, and inadequately lit and marked the crosswalk. The parties agreed to a bifurcated trial so that the court first could interpret a series of contracts between the government and the University of California to determine whether the government "owned" Cyclotron Road.

Prime Contract: In 1943 the University and the government contracted for federal use of University property for nuclear research. The contracting parties agreed to lease presently existing structures and to execute occupancy agreements for future structures and improvements. The University retained title to the underlying ground. The contract provides generally that all personal property furnished by the government shall remain "government property" whether or not it is affixed to University land. At the end of the contract term, the University may purchase structures and improvements placed by the government on the subject property, or require their removal at government expense.

Leases and Occupancy Agreements: In 1948 the government and the University executed lease and occupancy

agreements involving the land near Cyclotron Road. The Occupancy Agreement provides in pertinent part:

> "Article I. University hereby gives to Government, . . . the right to occupy and use jointly with University the property on which the Structures delineated as 'Government owned' on that certain map and statement . . . marked 'Exhibit A', and by this reference made a part of this agreement, are located together with the right of ingress to and egress from the Structures, over and across the presently existing road on the Campus of the University of California, Berkeley, California, commonly known as Cyclotron Road [since renamed], and over that certain road the construction of which is being undertaken [present Cyclotron Road] . . . ."

The lease similarly provides that the "Government shall have the right to ingress to and egress from the premises" over Cyclotron Road. In 1955 the parties modified this portion of the lease to read "Government and University shall have the right of ingress and egress from the premises" over Cyclotron Road.

Exhibit A: Exhibit A to the occupancy agreement, entitled "Statement and Map Delineating Government Owned Structures and Improvements on the Regular University Campus," contains a list of buildings number-keyed to a map of the laboratory site, under the heading "Government Owned Structures or Improvements." Cyclotron Road is not listed as "Government owned," but is mentioned under the separate heading "Utilities Financed by Government." The road is similarly classified in the 1955, 1961 and 1963 revised versions of Exhibit A.

Subcontracts: The prime contract makes the University responsible for subcontracting work, and requires government approval for government-financed road construction subcontracts. In April 1948 the University subcontracted with a private firm for the construction of Cyclotron Road. The road contract provides that "[t]he term 'Owner,' as used herein for convenience in utilizing the University of California forms of Agreement shall mean the Regents of the University of California, ..." In 1951 the University subcontracted to repair the road. The contract provided that "[t]itle to all work completed shall vest in the Government." The government approved and financed both the 1948 and 1951 contracts.

The district court held, after reviewing all the quoted documents, that the government never "owned" Cyclotron Road. The court observed that the prime contract and the 1951 subcontract "tend to support plaintiff's view," while the Occupancy Agreement and Exhibit A supported the government's position. Reasoning that the Occupancy Agreement and Exhibit A are the only relevant documents that specifically refer to Cyclotron Road, and that the government was not a direct party to the subcontracts, the court ruled that the government did not "own" the locus of the accident. The court subsequently denied Solmitz's motion to reconsider its findings of fact and conclusions of law[1] and dismissed the case on August 1, 1978,

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[1]Solmitz contends that he first learned of University accounting records allegedly listing the road as government property only after the district court ruled that the government did not own the road. The prime contract requires the University to keep a separate set of records for all government property in the University's pos-

"[u]pon the concession of the plaintiff that no basis for liability of the United States remains following the Court's denial of plaintiff's motion to reconsider . . . ."

This court will not reverse a district court finding of fact unless it is clearly erroneous. *Faberge, Inc. v. Saxony Products, Inc.*, 605 F.2d 426, 429 (9th Cir. 1979). We must, however, make an independent review of all questions of law. Interpreting unambiguous contractual provisions and determining their legal effect is normally an exercise that involves questions of law. *E. P. Hinkel & Company, Inc. v. Manhattan Company*, 506 F.2d 201, 204 (D.C.Cir.1974); *C. H. Codding & Sons v. Armour and Company*, 404 F.2d 1, 8 (10th Cir. 1968).

The written contracts executed by the University and the government are not ambiguous merely because the parties disagree on their intrpretation. *Clayman v. Goodman Properties, Inc.*, 518 F.2d 1026, 1034 (D.C.Cir. 1973). To the contrary, they contain within them everything necessary to settle the ownership question. Legal title to Cyclotron Road, therefore, is a question of law.

The contracts do not demonstrate that the United States owns Cyclotron Road. The University and the government together were parties to only two documents in evidence that specifically refer to Cyclotron Road: the Occupancy

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session. Solmitz, however, failed to subpoena University accounting records during two years of discovery. The decision whether to amend findings of fact or conclusions of law in light of newly discovered evidence rests within the discretion of the district court. Fed.R.Civ.P. 59(a)(2); *Thomas v. SS Santa Mercedes*, 572 F.2d 1331, 1336 (9th Cir. 1978). The district court did not abuse its discretion by denying the motion.

Agreement and "Exhibit A." These documents fail to establish any government interest in the road other than a right-of-way. Specific contractual references take precedence over general terms. Solmitz presented no evidence other than the contracts in support of his theory that Cyclotron Road is the "personal property" of the United States government.

Solmitz conceded in the district court that government liability depended upon whether the United States held legal title to the road. Therefore, the judgment of dismissal is affirmed.

Appendix B

In the United States District Court for the
Northern District of California

C-75-2330 RHS

Frank Solmitz, by and through his
Guardian ad Litem Patricia Solmitz,
Plaintiff,

vs.

United States of America,
Defendant

[Filed June 2, 1978]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties have tried to this Court, on written evidence only, the issue of the responsibility, if any, of defendant (hereinafter, "Government"), for a site called Cyclotron Road. Based on that evidence and the parties' briefs, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The complaint alleges that plaintiff was severely injured when, while crossing Cyclotron Road, on the Berkeley campus of the University of California (hereinafter, "University"), he was hit by a bicycle.

2. Before filing the complaint in this case, plaintiff duly filed an administrative claim with the appropriate Government agency. The claim was denied.

3. Thomas Janes, a University employee, designed Cyclotron Road and supervised its construction. The construction work was done by a private business firm, N.M. Ball Sons, pursuant to a 1948 agreement between it and the University Regents. This agreement was a subcontract under a prime contract between the Government and the University Regents. The Government's Atomic Energy Commission approved the subcontract, and the construction work was financed by the Government.

4. University personnel maintain and control Cyclotron Road.

5. The aforementioned prime contract governs the atomic energy research and development program at the University. Under Article IX, ¶ 2, of the prime contract:

> "Except for the University's fiscal and administrative records and except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property . . . and any other property purchased by the University, the cost of which is allowable under this contract, shall pass directly from the vendor to the Government."

6. In 1951 the University Regents, pursuant to the prime contract, agreed with a private businessman that the latter would do repairs on what is now Cyclotron Road. This subcontract (Article X, ¶ 1) provided that "[t]itle to all work completed shall vest in the Government."

7. In 1948 the Government and the University Regents executed an occupancy agreement. Under Article I thereof the Regents gave the Government the rights: (a) to occupy and use the University property on which Govern-

ment-owned structures were located; and (b) of ingress to, and egress from, those structures, over two specific roads—the one then called Cyclotron Road, and the one that is presently called Cyclotron Road. The latter was the site of plaintiff's accident. Any further reference in the findings of fact and conclusions of law to "Cyclotron Road" is a reference to the site of plaintiff's accident.

8. Exhibit "A" to the occupancy agreement is entitled "Statement and Map Delineating Government Owned Structures and Improvements on the Regular University Campus." Below that title is the heading "Government Owned Structures or Improvements." Cyclotron Road is not listed under that heading. But it is listed on the same page under the heading "Utilities Financed by Government." Cyclotron Road is also not listed under the "Government Owned Structures or Improvements" heading in the 1954 revision of Exhibit "A".

9. Under Article XII of the lease between the University Regents and the Government, the latter

> "assumes all risk of injury or damage to person . . . and University shall be free from all liabilities, claims or suits for and shall not be responsible for damages by reason of injury . . . to any person . . . while in, upon or adjacent to the premises or any structure thereon . . . . and Government shall hold University harmless from all costs, charges, damages and expenses including court costs and counsel fees in respect to any such injury . . . , liabilities, claims, demands or suits, and also in respect to any and all claims arising from any . . . negligence of Government . . ."

CONCLUSIONS OF LAW

1. This Court has subject-matter jurisdiction of this case, pursuant to the Federal Tort Claims Act [28 U.S.C. § 1346(b)].

2. It is unclear if Article XII of the lease applies to personal injuries on Cyclotron Road. But even if it does apply to such injuries, Article XII does not make the Government liable to plaintiff. Instead, Article XII was meant to make the Government liable only to the University Regents, which liability would arise after the Regents were actually sued [see *Bramer v. U.S.*, 412 F.Supp. 569, 578-579 (C.D. Cal. 1976)].

3. Plaintiff contends that the Government owns Cyclotron Road, while the Government contends that its sole interest in the road is a right of ingress to, and egress from, Government-owned buildings. The language—quoted in the findings of fact—from the prime contract and the 1951 subcontract does tend to support plaintiff's view, and plaintiff states that the other post-1948 subcontracts involving Cyclotron Road contain similar language.

On the other hand, the occupancy agreement states that, as the Government contends, the present Cyclotron Road is a means of Government ingress to, and egress from, Government-owned structures. The Fidler and Reynolds declarations, on which plaintiff relies, say that Exhibit "A" to the occupancy agreement lists Cyclotron Road as "Government-owned". However, Cyclotron Road is actually listed on the 1948 Exhibit "A" (attached to both declarations) as Government-financed, whereas certain structures and improvements are listed under a "Government

owned" heading. The content of Exhibit "A" and the language of the occupancy agreement are, together, strong evidence that Cyclotron Road is not Government-owned. To the extent that the quoted language from the prime contract and other language from the prime contract are inconsistent with the occupancy agreement and Exhibit "A", the occupancy agreement and Exhibit "A" should control; they, unlike the relevant parts of the prime contract, specifically refer to Cyclotron Road [see Cal.CCP § 1859]. And language, relied on by plaintiff, from subcontracts involving Cyclotron Road, carries less weight with this Court than does the aforementioned language in the occupancy agreement, since the Government was a party to that agreement but not to the subcontracts, even if it did approve the latter.

In sum, plaintiff has not met his burden of showing that Cyclotron Road has ever been Government-owned, and this Court concludes that the Government never has owned it.

4. Thus, liability, if any, of the Government to plaintiff may not be based on either Article XII of the lease or the proposition that the Government has ever owned Cyclotron Road.

5. On Friday, June 16, 1978, at 11:00 a.m., there will be a status conference, to discuss this case's future course.

Dated: June 2, 1978

/s/ ROBERT H. SCHNACKE

Robert H. Schnacke
United States District Judge

Appendix C

In the United States District Court
for the Northern District of California

Civil No. C-75-2330-RHS

Frank T. Solmitz, by and
through his Guardian ad Litem
Patricia Solmitz,
Plaintiff,

vs.

United States of America,
a sovereign nation,
Defendant.

[Filed July 31, 1978]

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

This cause having come regularly on for hearing on Plaintiff's motion to reconsider; and

All parties having been offered the opportunity to be heard on July 20, 1978, pursuant to Plaintiff's notice and motion;

It is Hereby Ordered that Plaintiff's motion to reconsider be and it hereby is, denied.

Dated: 31 July 1978

/s/ ROBERT H. SCHNACKE
United States District Judge

Appendix D

In the United States District Court
for the Northern District of California

Civil No. C-75-2330-RHS

Frank T. Solmitz, by and
through his Guardian ad Litem
Patricia Solmitz,
Plaintiff,

vs.

United States of America,
a sovereign nation,
Defendant.

[Filed July 31, 1978]

JUDGMENT

Upon concession of the plaintiff that no basis for liability of the United States remains following the Courts denial of plaintiff's motion to reconsider the Court's Findings of Fact and Conclusion of Law,

It is Hereby Ordered, Adjudged and Decreed that the case is dismissed, each party to bear its own costs.

Dated: 31 July 1978

/s/ ROBERT H. SCHNACKE
United States District Judge

Appendix E

United States Court of Appeals
for the Ninth Circuit

No. 78-3419
D.C. No. C-75-2330

Frank T. Solmitz, by and
through his Guardian ad Litem
Patricia Solmitz,
Appellant,

vs.

United States of America,
Appellee.

[Filed May 8, 1981]

ORDER

Before: Goodwin and Norris, Circuit Judges, and McNichols,* District Judge

Appellant's petition for rehearing is denied.

*The Honorable Robert J. McNichols, United States District Judge for the Eastern District of Washington, sitting by designation.

Appendix F

10 U.S.C., § 2353.

(a) A contract of a military department for research or development, or both, may provide for the acquisition or construction by, or furnishing to, the contractor, of research, developmental, or test facilities and equipment that the Secretary of the military department concerned determines to be necessary for the performance of the contract. The facilities and equipment, and specialized housing for them, may be acquired or constructed at the expense of the United States, and may be lent or leased to the contractor with or without reimbursement, or may be sold to him at fair value. This subsection does not authorize new construction or improvements having general utility.

(b) Facilities that would not be readily removable or separable without unreasonable expense or unreasonable loss of value may not be installed or constructed under this section on property not owned by the United States, unless the contract contains—

(1) a provision for reimbursing the United States for the fair value of the facilities at the completion or termination of the contract or within a reasonable time thereafter;

(2) an option in the United States to acquire the underlying land; or

(3) an alternative provision that the Secretary concerned considers to be adequate to protect the interests of the United States in the facilities.

(c) Proceeds of sales or reimbursements under this section shall be paid into the Treasury as miscellaneous receipts, except to the extent otherwise authorized by law with respect to property acquired by the contractor.

Appendix G

ARTICLE IX—PROPERTY

• • • •

2. Title to Property. Title to all property furnished by the Government shall remain in the Government except as otherwise provided in this Article. Except for the University's fiscal and administrative records and except as otherwise provided by the Contracting Officer, title to all materials, equipment, supplies, and tangible personal property of every kind and description and any other property purchased by the University, the cost of which is allowable under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The University shall make such disposition of rejected items as the Contracting Officer shall direct. Title to property furnished by the University, the cost of which is allowable under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, whichever first occurs. Property furnished by the Government and the property purchased or furnished by the University, title to which vests in the Government under this paragraph, are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property, or

any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

• • • •

10. Lease and Occupancy by Commission of Real Property Owned by University-Disposition of Premises Altered or Constructed.

a. It is understood that the University and the Commission have developed mutually satisfactory arrangements for the lease or occupancy of real property of the University upon which structures and other improvements financed by the Government are or will be constructed or altered. These arrangements also cover the disposition of such structures and improvements. The basic terms and conditions applicable to arrangements for property of the University known as the Wilson Tract, Plots "O" and "M" and the regular University campus (herein deemed to include the Bailey Tract and two sections of State University Tract) are set forth in Appendix C to Modification No. 20 which is made a part of this Modification No. 22. It is understood that except as provided in Appendix C, the Commission shall have no obligation to restore the premises with respect to such structures and improvements.

b. It is understood that with respect to construction and alterations financed by the Government to University-owned buildings and structures under this contract, the University, upon termination or by mutual agreement at any time prior thereto, shall elect whether (i) to retain the benefit of such construction or alteration, in which case the University shall return to or credit the Government with the portion of the reimbursement by the Government

for its expenditures therefor determined by negotiation between the University and the Commission to be fair and proper or (ii) to have such premises restored to substantially the same condition as prior to such alteration or construction, in which case it shall retain all such reimbursement and the Government shall pay the net cost of such restoration; provided that as to any such alteration or construction commenced after October 1, 1962, the Government shall be under no obligation to restore or bear any costs of restoration except as otherwise agreed upon.

• • • •

Appendix H

OCCUPANCY AGREEMENT BETWEEN UNIVERSITY OF CALIFORNIA AND U. S. ATOMIC ENERGY COMMISSION FOR PROPERTY ON BERKELEY CAMPUS

This Agreement, entered into on the 28th day of June 1948, effective on the first day of July 1948, between the United States of America (hereinafter called "Government") acting by and through the United States Atomic Energy Commission (hereinafter called "Commission"), and The Regents of the University of California, a corporation of the State of California (hereinafter called "University").

RECITES:

1. That pursuant to the provisions of a contract designated No. W-7405-eng-48, entered into on the 20th day of April 1943, effective as of the first day of May 1943, between the parties hereto, Government and University have collaborated in a program of research and development related to atomic energy; and

2. That the term of Contract No. W-7405-eng-48 has been extended to June 30, 1952 with provision for renewal by mutual agreement; and

3. That Appendix "C" of Contract No. W-7405-eng-48, Modification No. 17, provides that Government and University shall enter into an agreement under which Gov-

ernment may occupy and use, in connection with the performance of the work contemplated to be performed pursuant to the provisions of Contract No. W-7405-eng-48 as extended, certain buildings and improvements (hereinafter referred to as "Structures") heretofore erected on the Campus of the University of California at Berkeley, California, pursuant to contracts between the parties hereto numbered OEMsr-324, OEMsr-687, and W-7405-eng-48.

Now, Therefore, the parties hereto do hereby agree as follows:

Article I. University hereby gives to Government, only for the accommodation, housing and use of Commission, or any successor to the Commission, in connection with the performance of the work contemplated to be performed pursuant to the provisions of Contract No. W-7405-eng-48 and any renewal or extension thereof, or contemplated to be performed pursuant to the provisions of any successor contract to Contract No. W-7405-eng-48, or any renewal or extension thereof, the right to occupy and use jointly with University the property on which the Structures delineated as "Government owned" on that certain map and statement entitled "Radiation Laboratory Buildings, University of California, Berkeley, California, March, 1948", hereunto attached, marked "Exhibit A", and by this reference made a part of this agreement, are located together with the right of ingress to and egress from the Structures, over and across the presently existing road on the Campus of the University of California, Berkeley, California, commonly known as Cyclotron Road, and over that certain road the construction of which is being undertaken pursuant to the provisions of that certain subcontract dated

the 20th day of April 1948, between The Regents of the University of California and N. M. Ball & Sons and over any other road or other reasonable means of access subsequently to be constructed or provided by either University or Government.

There is hereby expressly reserved to University the right to use and occupy the hereinabove mentioned Structures jointly with Government in connection with the performance of the work contemplated to be performed pursuant to the provisions of Contract No. W-7405-eng-48 or any renewal or extension thereof, or conducted pursuant to any successor contract to Contract No. W-7405-eng-48, or any renewal or extension thereof.

All personal property of Government, including without limitation scientific equipment and facilities of any nature in the Structures, whether affixed thereto or not, shall remain the property of Government and be subject to provisions of Contract No. W-7405-eng-48 as amended and any successor agreement and not be affected by the provisions of this occupancy agreement.

Appendix I

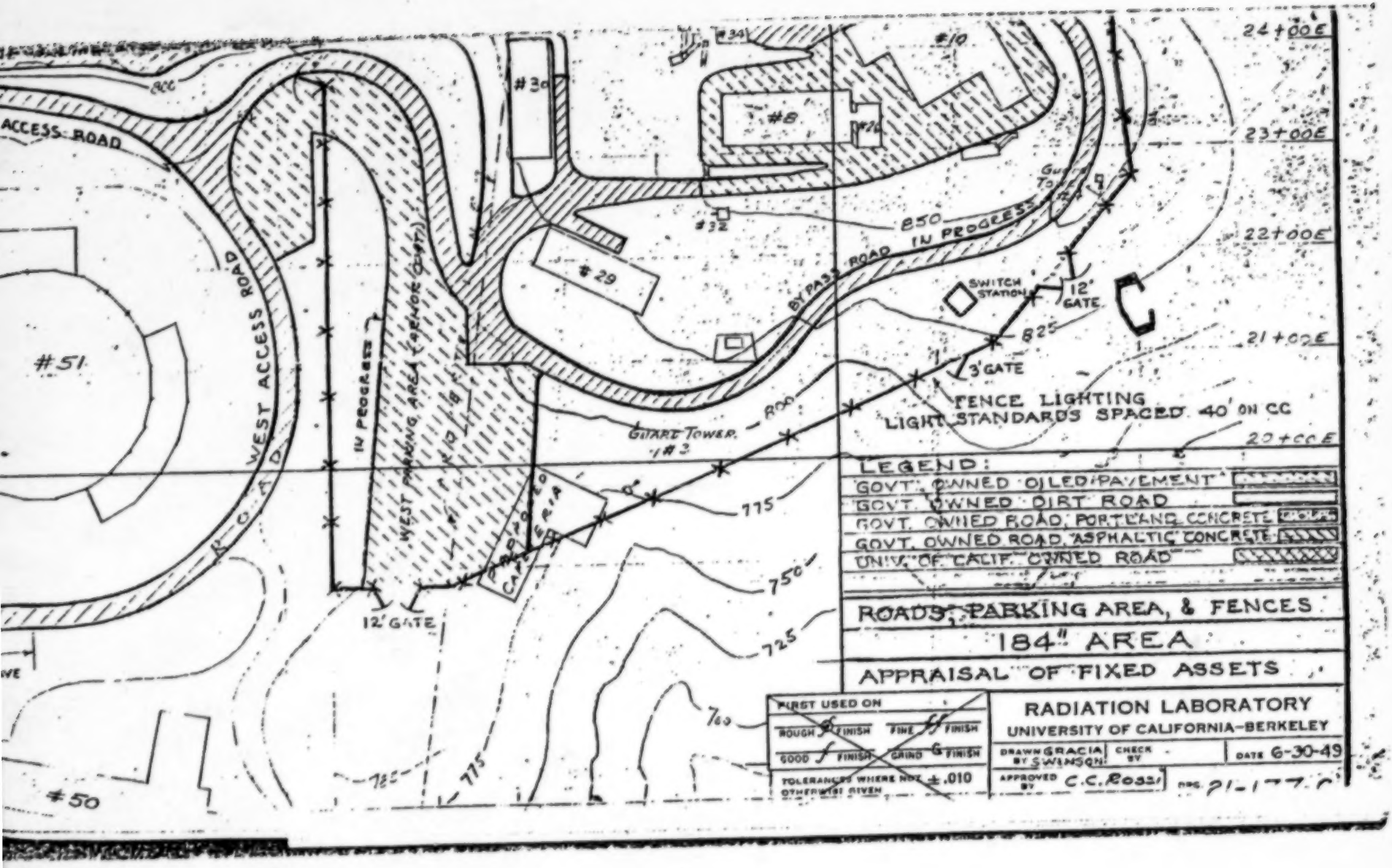
OCCUPANCY AGREEMENT
EXHIBIT A
RADIATION LABORATORY BUILDINGS
UNIVERSITY OF CALIFORNIA, BERKELEY, CALIFORNIA
STATEMENT AND MAP DELINEATING
GOVERNMENT OWNED STRUCTURES AND IMPROVEMENTS
ON THE REGULAR UNIVERSITY CAMPUS

Contract W-7405-eng-48
Modification 17

March, 1948

Number	Government Owned Structures or Improvements
4	Chemistry, 184"
7	Machine Shop and Stores
8	Engineering, Drafting and Research
9	Pattern and Assembly
10	Linear Accelerator and Welding
11	Electric and Plumbing
12	Foundry and Sheet Metal Shop
14	General Stores Warehouse
15	Gate Office
16	MC Laboratory
17	Paint Shop
25	Synchrotron
26	Conference Room and Vault
28	Field Office
29	A. E. C. Administration
30	Radiation Laboratory Administration
31	Acid Storage Shed
32	Counting House
33	Magnetic Measurements (Gauss House)
35	Plating House (under construction)
40	Glass Warehouse
41	Wire Warehouse
42	Miscellaneous Warehouse
43	Electronics Warehouse
44	Miscellaneous Warehouse
45	Synchrotron Warehouse

Utilities Financed by Government
Road on regular University Campus constructed pursuant to subcontract with N. M. Ball & Sons, dated April 20, 1948, financed by the Government.
Miscellaneous roads and walks financed by Government


ACCESS ROAD
#51
#50
#30
#34
#10
#8
#14
#32
#29
WEST ACCESS ROAD
IN PROGRESS
WEST PARKING AREA (TEMPORARY)
PROPOSED CAFETERIA
12' GATE
GUARD TOWER #3
BY PASS ROAD IN PROGRESS
SWITCH STATION
12' GATE
3' GATE
850
825
775
750
725
700
24+00E
23+00E
22+00E
21+00E
20+00E
FENCE LIGHTING
LIGHT STANDARDS SPACED 40' ON CC
LEGEND:
GOVT. OWNED OILED PAVEMENT
GOVT. OWNED DIRT ROAD
GOVT. OWNED ROAD, PORTLAND CONCRETE
GOVT. OWNED ROAD, ASPHALTIC CONCRETE
UNIV. OF CALIF. OWNED ROAD
ROADS, PARKING AREA, & FENCES
184" AREA
APPRAISAL OF FIXED ASSETS
FIRST USED ON
ROUGH f FINISH
FINE ff FINISH
GOOD f FINISH
GRIND G FINISH
TOLERANCES WHERE NOT ± .010 OTHERWISE GIVEN
RADIATION LABORATORY
UNIVERSITY OF CALIFORNIA-BERKELEY
DRAWN BY GRACIA SWINSON
CHECK BY
DATE 6-30-49
APPROVED BY C.C. Rossi
DWG 21-177-C